United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1143 B Pgs.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-1143

UNITED STATES OF AMERICA

Plaintiff-Appellee

vs.

JAMES V. CANESTRI

Defendant-Appellant

BRIEF OF DEFENDANT-APPELLANT

JAMES V. CANESTRI

IRA B. GRUDBERG, ESQ.
JACOBS, JACOBS & GRUDBERG, P.C.
207 ORANGE STREET
NEW HAVEN, CONNECTICUT 06503

Attorneys For Defendant-Appellant
James V. Canestri

TABLE OF CONTENTS

TABLE OF CASES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-1143

UNITED STATES OF AMERICA

PLAINTIFF-APPELLEE

VS.

JAMES V. CANESTRI

DEFENDANT-APPELLANT

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

The instant prosecution was initiated by way of a three count indictment returned on November 21, 1972 by a grand jury in New Haven. (2a) A summons was issued and on December 26, 1972 defendant pleaded not guilty to all charges. (1a) Among timely motions filed on February 8, 1973 were a Motion to Suppress Evidence and a Motion to Compel Government to Disclose Name and Address of So-Called Reliable Informant. The latter motion, when originally scheduled, was marked off without prejudice to be considered with the Motion to Suppress. An evidentiary hearing was held before Judge Zampano on February 6, 1974. (1aa) After briefing by both sides, the court denied defendant's

motion in all particulars by memorandum filed May 23, 1974. (1aa)

The case was tentatively scheduled for a court trial based upon defendant's offer to waive his right to a jury but the government refused to waive. A jury was selected on October 16, 1974. The trial commenced on the 23rd, concluding the following day with findings of guilty on all counts. Before the jury actually heard evidence, the court heard, partially granting and partially denying defendant's oral motion to suppress evidence of alleged oral and written statements made to various law officers. The court also denied defendant's written renewal of his earlier Motion to Suppress Evidence. (1aaa)

After conviction defendant filed a timely Motion for New Trial which was denied on the date of sentencing, March 10, 1975. On that date Judge Zampano imposed concurrent 18 month prison terms on each of the three counts of the indictment. Notice of Appeal was filed on March 18, 1975.

Defendant on this appeal only raises issues concerning the validity of a search of and seizures at premises at 85 Graniss Road, Orange, Connecticut on October 19, 1972 and the correctness of the rulings of the court below on the pretrial Motion to Suppress Evidence.

STATUTES INVOLVED

26 U.S.C. §5861

It shall be unlawful for any person--

...

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record...

26 U.S.C. §5871

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both, and shall become eligible for parole as the Board of Parole shall determine.

26 U.S.C. §5845

For purposes of this chapter--

...

(b) Machinegun.--The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts which a machinegun can be assembled if such parts are in the possession or under the control of a person.

...

(h) Unserviceable firearm.--The term "unserviceable firearm" means a firearm which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition.

...

ISSUES PRESENTED

1. May information from a "known" but unidentified

informant, with no showing of reliability, establish probable cause for issuance of a search warrant where that information is buttressed by little or no extensive corroboration?

2. May officers present on premises by virtue of a warrant directing a search for and seizure of specific items expand that foray into almost a five hour exhaustive investigation of and search into items not named in the warrant and which were not on their face obvious contraband?

THE FACTS

Two local police officers on October 19, 1972 went before a judge of Connecticut's Circuit Court seeking search warrants for premises of Joseph Canestri at 85 Graniss Road and of Kenneth Davis at 346 Knight Lane in the town of Orange. Identical affidavits were presented to the same judge in support of each application. The affidavits set forth the fact of a burglary at the home of one Anthony Mezzanotte three days prior and the resultant theft of an antique gun collection which the officers went on to meticulously describe. The officers stated that one of them had, a day earlier, spoken to an informant "whom...[he] has known for the past two years" who told him he had been on the Canestri premises on the 17th and had allegedly been shown "several antique handguns". The informant had described and the officers set forth the specific description of

of the four guns he claimed to have seen (which we claim, infra, differ very markedly from the stolen guns) and then the officers added their gratuitous conclusion about the four weapons--that they "all...fit the description of guns taken from the Mezzanotte home." (7a) The informant further stated Canestri claimed to have purchased the antiques. (7a)

The officers seeking the warrant went on to inform the magistrate that another officer told them Joseph Canestri was a "juvenile" "known to him" as living at the stated address, who had at some time in the past ten months been "found to be in possession of stolen merchandise taken from a house break" in Orange that past January. (8a) Records were checked confirming the correct address of the Canestris on Graniss Road and it was finally stated, concerning young Joey Canestri, that it was "common knowledge to members of this department" and the affiants that Canestri and Davis "are friends and associates". (8a)

As to the Davis boy, the other policeman, Officer Stankye was told by an informant that Davis had showed him "three hand guns", one of which had "eight rotating barrels", another nickel plated. That information, in sharp contrast to the "Canestri informant" came from a person "known to...Stankye for three years and who has furnished him with substantial information on numerous occasions, and reliable information which has led to five arrests and five convictions". The Davis address had also

been checked out with town land records and, finally, the officers stated that they "were advised that Kenneth J. Davis had been in the Mezzanotte house within the last three months". (8a)

The Circuit Court judge signed the warrant on October 19, 1972 and state officers proceeded to execute it that same evening. The search was described by two officers, Robert Rubino of the Orange police and Vincent Fumiatti of New Haven. Four policemen, of an eventual search party of six, arrived at the Canestri home at about eight in the evening. (23a) Only Mrs. Canestri (mother of both the defendant and the Joseph Canestri mentioned in the affidavit and warrant) was home, but a friend of the family, Carl Dibianco arrived a short time later. (24a) Over a period of about an hour, a thorough search of most of the house yielded only a syringe found in Joey's room, but no antique weapons. (25a-28a) Attention then centered upon a locked room in the cellar of the house. Mrs. Canestri did not have a key to that room and she indicated to the officers that the room was used by her son James who did not live on the premises. (28a, 29a) She stated "she had never been in it, or something to that effect". (77a)

Mrs. Canestri told Rubino she had tried unsuccessfully to reach James by phone. (30a) Dibianco then called the defendant, in Detective Fumiatti's presence. (79a) Fumiatti heard Dibianco tell James Canestri of the search party and the fact they wanted to search his locked room in the basement. When the accused could

not come over immediately, he obtained word that they should force the door as gently as possible. (79a, 80a) That was done at approximately 9:00 P.M., one hour or so after the search began and almost four hours before the police left. (32a, 33a)

Inside James Canestri's basement room were approximately 70 weapons. (34a) Methodically, over the next three and a half hours, Rubino checked out each and every weapon, five at a time, with the National Crime Information Computer Center, by means of a series of long distance calls to Hartford. (35a, 36a) Although many of the weapons were in open view, there were some (including those relevant to this indictment) found in a locked cabinet within the basement room. (38a, 39a) When Canestri arrived shortly after they had started making calls to Hartford, he was asked to open the cabinet and he did; (38a) Rubino clearly stated, however, that it was his intention to open and search the cabinet whether or not the defendant opened it for him. (60a)

In addition to the three guns named in the indictment, the officers left early the next morning with one other supposed "automatic" which turned out not to be a machine gun, (67a) and seven other allegedly stolen weapons--the fruits of the three and one half hours of telephone calls to Hartford. (10a, 65a-66a)

Later check by agents of the Alcohol, Tobacco & Firearms Division revealed that the weapons here in issue had not been registered to the defendant resulting in the prosecution at bar.

ARGUMENT

I. The Affidavit Here Submitted to the State Magistrate Failed to Establish Probable Cause to Justify Issuance of a Warrant to Search the Canestri Premises

This search, carried out by local police, must nonetheless conform to federal constitutional standards, Elkins v. United States, 364 U.S. 206 (1959); Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23 (1963). Before a search warrant may legally be issued, there must be a sworn statement establishing probable cause that the property sought is on the premises to be searched. That much, of course, is simple horn book law. What has proved far more difficult for the courts has been the question of "how much is enough"--especially where a substantial part of the claimed basis for the warrant has been supplied by alleged information obtained by police from a third party, most often an unnamed informant of some kind.

The Supreme Court, in Aguilar v. Texas, 378 U.S. 108 (1964) set down its by-now-famous "two pronged test". Where evidence obtained from an informant is relied upon in establishing probable cause for issuance of a warrant, those seeking the warrant must (1) set forth in the affidavit sufficient facts establising the reliability of the informant, and (2) must set forth in the affidavit the underlying facts and circumstances given which led him to conclude that the items sought would be present on the premises to be searched. Later, in Spinelli v. United

States, 393 U.S. 410 (1969), the Court seemed to state rather clearly that partial corroboration of the informant's statements--in extrinsic facts or evidence--did not avoid the necessity of independently establishing the informer's reliability. Without showing facts from which the magistrate could make a finding of such reliability, the Court seemed to say, the informer's statements could not be used in any way in assessing probable cause. More recently the Supreme Court backtracked considerably from the Spinelli standard in United States v. Harris, 403 U.S. 573 (1971). The court there upheld issuance of a warrant based partially upon information from a person who the affiant "found...to be a prudent person"* where (1) the officer had known the accused to be, for the past four years a "trafficker" in nontaxpaid alcohol; (2) a sizable stock of illegal liquor had been found at his house during that time; (3) the informant was implicating himself on criminal charges in giving the statement; and the information given was in very specific and great detail establishing clear violation of the law. In so holding, the court restated the test as one requiring a showing of a "substantial basis" for crediting the hearsay of the unnamed informant. It is essentially against this background which we must judge the sufficienty of the Canestri warrant, and we respectfully submit that it falls far

*There were no allegations of prior information given or of earlier accurate information leading to arrests and convictions.

short of establishing probable cause.

A. There was no "Substantial Basis" Shown for Crediting the Informer's Hearsay

The affidavit before the court completely fails, directly or indirectly, to provide a basis for a finding of reliability as to the "Canestri informer". Looking to the Aguilar test--which we might describe as the "direct" method of showing reliability, there is absolutely nothing in the affidavit which tends to support such a finding.

The only description of the Canestri informer was that Officer Addil had "known [him] for the past two years". Merely being "known" by a police officer hardly establishes reliability; police officers, like the rest of us, "know" lots of unreliable people--perhaps more so than most people. The failure to say any more about him takes on even added weight because of the very careful description of the "Davis informant" later on in the same affidavit. In Paragraph 5 of the affidavit Officer Stankye set forth in detail that his informant had given him "substantiated information on numerous occasions" which had led to five arrests and convictions. Surely, if the situation were similar as to Officer Addil's informant, the issuing magistrate would have been so informed. One can almost draw the negative inference that the informer concerning the Canestri boy was indeed "unreliable"!

The Harris approach to the problem of establishing reliability is, in a way, the use of "circumstantial evidence"--

looking to the rest of the affidavit, the "corroboration"--to see whether it lends support to the alleged statements of the informant in order, in turn, to allow the issuing magistrate to credit the informer's tale along with the so-called corroboration. While personally one may feel--and the undersigned has often argued--that Harris presents a classical case of bootstrapping, it is the law and must here be met. A careful look at the instant affidavit, as against the affidavit and opinion in Harris, indicates that even under the Harris test there was here a failure to establish either the reliability of the informant or probable cause for the warrant.

Harris was a 5-4 decision, in which significantly, there were four different reasons from which the Court's "majority" was forged. Mr. Justice Black would have overruled both Spinelli and Aguilar. Mr. Justice Stewart joined only in Part I of the Harris opinion which held that there was an "ample factual basis for believing the informant which, when coupled with affiant's own knowledge of the respondent's background", would justify the issuance of the warrant. The Chief Justice, in Part III of his opinion, relied heavily on the fact that the informer's reliability was enhanced by his having giving information which incriminated him. Mr. Justice White concurred only in that portion of the opinion establishing reliability based upon the statements against penal interest. Even Harris, therefore, does not very clearly tell us what kind of "corroboration" effectively establishes an informant's

reliability by extrinsic means.

Whatever Harris stands for, based upon the polyglot nature of its "majority"--it clearly represents the outer fringe of how far our courts have gone to justify issuance of a warrant based upon information from an unnamed confidential informant. Neither Harris nor Jones v. United States, 362 U.S. 257 (1960), relied on so heavily in the opinion of the Chief Justice in Harris, come close to justifying the issuance of the warrant in this case. In Harris, the informant was described as "prudent"--and as being in fear of his life if his name should be revealed. As noted above, and at length in the opinion, the Harris informer incriminated himself and was therefore presumptively reliable.

While the Harris court, perhaps sensibly, felt that drawing the line between "prudent" and "reliable" was being overly technical with police officers, United States v. Ventresca, 380 U.S. 102 (1965), the total and obviously deliberate failure here to characterize the informant is far different. In this case, the Addil informant was merely "known" to the officer--with no indication of his being "prudent" or that there was any justification for his remaining nameless. More important, there was no indicia of reliability shown by his having given a statement against penal interest. In Jones, there was corroboration of the informers' reliability based upon the fact the officer had known both informer and defendant personally to have exhibited "tracks" on

their arms. In both Jones and Harris there was further corroboration--by "other sources of information" to the affiant and "other officers of the narcotic squad" in Jones, and "numerous information (Sic) from all types of persons" in Harris. There is nothing even vaguely comparable in the affidavit before the court. Both Jones and Harris involved continuing "business" type crimes--narcotics and moonshine respectively; in such circumstances the defendants' apparent widespread reputation, as set forth in those affidavits, with specialized law enforcement agencies dealing with continuing violations in those areas might well be given some consideration by the issuing magistrate and reviewing court. The case at bar presents neither that sort of offense nor that sort of allegation in the affidavit.

The affiants state that they were told by a fellow officer that at some undetermined or unmentioned time apparently the Canestri boy was "found to be in possession of stolen merchandise" from a house break 10 1/2 months earlier. The affiants do not state that the alleged possession was under circumstances appearing criminal either by nature of the extent of the items possessed, or by reason of its closeness in time to the theft. The affidavit does not state that charges had been preferred against Joey Canestri or that a conviction had been obtained. This isolated and vague allegation concerning a young high school student surely falls far short of the "corroboration" found by the courts in Jones and Harris. In every way the showing here fails to satisfy

even the Harris criteria--in the showing of "reliability"--in the alleged "corroboration"--and in the "reputation" of the target of the proposed search. As a sharply divided 5-4 court, for all kinds of reasons not shown here, had to struggle to uphold the Harris warrant, it is clear this affidavit-far weaker, must fail.*

B. The Affidavit Failed to Establish Probable Cause even if the Court Considers and Weighs The Informant's Statement

Aside from the alleged statement from the informant, there is virtually nothing in the affidavit supporting issuance of a warrant. The fact that the Davis boy, a "friend and associate" of the Canestri boy was seen with antique weapons a day or two before cannot conceivably support a search of the Canestri premises.** The fact that Joseph Canestri was "found to be in possession of stolen merchandise" sometime in the past 10 months, alone or in conjunction with other facts stated in the affidavit, adds little. Neither we nor the magistrate were informed of sufficient particulars of that allegation to allow any inference to

---

*We have further read also the cases cited by Judge Zampano below and find in none of them a justification for issuance of the warrant here.

**Whatever relevance it might have, and that is at least questionable, the fact that the officers were somehow "advised" that Davis had been in the Mezzanotte home within the past three months must be totally disregarded as there is not a shred of evidence concerning who so "advised" them or upon what specific facts that "advice" was based.

be drawn. Even if the court finds, however, contrary to our argument in the preceding section, that the "known" informant's story may be used in weighing the presence or absence of probable cause, the affidavit still falls short.

In this regard, the informant supposedly told officer Addil that he had seen "various guns" on the Grannis Road premises a couple of days after the theft. The officers restated the description of the guns as told them, and then went on to their own conclusion that the guns which the informer supposedly saw "all... fit the description of guns taken from the Mezzanotte home". We submit that a careful look at Paragraph 2 and 3 of the affidavit does not bear out the affiants' conclusion, and that there was no probable cause shown (even considering the informant's statement) to believe that the stolen weapons were at the Canestri home.

For ease of comparison, we will set out in table form those guns described in the affidavit as having been stolen, and as having been on the Canestri premises.

Stolen Guns	Guns Allegedly at Canestri Home
1. Pair of dueling pistols with wood grain stocks, eight sided barrel, 85 calibre with built in ram rod.	1. Rotating multi-barrel revolver.
2. A six barrels pepper pot with solid stock rotating barrels made of dark brown metal.	2. A nickel plated revolver without a trigger guard.
3. A two barrel over under silver engraved pistol with wood grips.	3. A hammerless revolver.
4. A single barrel pistol of brown metal with brown grips.	4. A revolver with a very long barrel.

Stolen Guns (cont.)

5. Silver pin fire guns with built in cleaning rods and hammerless.

6. A all engraved white steel hand gun.

7. A nickel plated 32 calibre hammerless pistol with mother of pearl grip in a black leather case.

8. A winchester fourteen inches.

9. 31 calibre nickel plated hand guns with a five inch barrel and no trigger guard.

10. Small hand gund approximately three inches long.

11. A twenty inch 45 calibre belgium hand gun with a lip at the end of the barrel.

12. Palm guns, five short and 22 calibre, four inches long with no trigger guards.

In reading the affidavit initially, and quickly, it may appear that there is a close similiarity between the weapons alleged to be in the possession of Joey Canestri, and those stolen from the Mezzanotte house. If one takes even a moment, however, and looks at the above table with even a bit of care, it can be seen that this simply is not so. The "rotating multi-barrel revolver" described on the Canestri premises could arguably "fit the description" of the "six barreled pepper pot with solid stock rotating barrels made of a dark brown metal". As to the other three guns the informer described to Officer Addil, however,

they simply do not fit the description of the stolen guns. The stolen nickel plated weapon minus a trigger guard was not a revolver, although the officers used that description elsewhere in the affidavit. The hammerless revolver described as having been seen at the Canestri house does not fit the description of the weapon stolen from the Mezzanotte's, which was described as "a nickel plated .32 calibre hammerless pistol with mother of pearl grip and a black leather case". Finally, neither of the long-barreled weapons described as having been stolen, "the automatic 10 shot" and the ".45 calibre belgium hand gun" are described as being revolvers; the long barreled weapon seen at the Canestri house was in fact described as a revolver.

The revolver is a very distinctive type of hand gun--and the revolving aspect of the chambers would almost always be the most distinctive feature one would notice and describe about that type of weapon. The simple fact is that every single one of the weapons allegedly seen in the possession of Joseph Canestri was a revolver, while only one of the twelve weapons listed in the affidavit as having been stolen was described as a revolver. It is one thing to hold, as did the Supreme Court in Ventresca, that police officers must not be held to precise "legal" language in seeking search warrants; it is another to presume that in describing weapons--surely a subject matter which policemen would be expected to discuss with real knowledge and precision--these

officers described "white" when they really meant "black".

The Fourth Amendment to the Constitution of the United States, protecting citizens' homes from unreasonable search and seizure, has long been one of the most important protections guaranteed us by our founding fathers. To authorize a governmental search of a home, there should be a substantial and serious showing that the specific items, or type of contraband sought, are indeed present on the premises. To allow a search based upon the showing here would be to strip the privacy of the home merely upon a showing of suspicious circumstances. Simply, there is insufficient reason to believe, based upon description of the weapons given to Officer Addil, that those weapons, or anything else that might be found in the Canestri home, were stolen in the earlier burglary. It surely would not be enough, if some money had been stolen, to learn that a suspect had been found to be in possession of money. Although the analogy may seem inapposite, or too simple, we submit it is apt. The possession of a couple of antique guns should not be enough to justify a search of one's home--even if there had been a recent burglary--unless there is some significant showing that the "antique weapons" match with what was stolen. That was not the case here, and the affidavit, in its entirety, failed to establish probable cause for the warrant.

II. The Lengthy and Elaborate Search and Investigation of James Canestri's Gun Collection and Seizure of the Weapons Here Relevant was a General Search far Beyond that Authorized by the Warrant

A. Search of the Defendant's Room was Beyond the Scope of the Warrant.

The facts alleged in support of the warrant implicitly assumed (for lack of any contrary information) that the Canestri residence was a single, unified dwelling place, and that Joseph Canestri, the suspect in the antique gun case, had access to the entire house. That assumption was wrong. The police discovered, in the course of their search, that a room in the basement was separated from the rest of the house, and that James Canestri alone had the key to that room. No one else had access to or control over James Canestri's room. The situation presented to the police, therefore, was one where (upon further investigation) their warrant purported to authorize a search of an area broader than that for which probable cause had even purportedly been demonstrated--an area which the younger Canestri had no control over or access to. Notwithstanding that fact, they insisted upon a search of that area; that search was therefore illegal.

The hotel situations are somewhat analogous. In Stoner v. California, 376 U.S. 483 (1964), the Supreme Court held that a hotel guest had a sufficient interest in his room to require a warrant as to that particular room. Even the guest's absence

and a hotel clerk's consent was inadequate to justify the search. In Chapman v. United States, 365 U.S. 610 (1961), the Court held that a search of a house occupied by a tenant invaded the tenant's Fourth Amendment rights, even though the owner of the house, who had authority to enter the house for some "landlord" type purposes, had authorized the search. In Chapman and Stoner, the Court recognized that a person may have a constitutionally protected interest in a single room, regardless of the interests others may have in the same overall property.

An analogy may be illuminating here. Assume a warrant had been sought and obtained to search premises of John Doe at 36 Main Street, based upon an affidavit setting forth certain facts about Doe and what he supposedly secreted at his premises--and a statement that the premises were a single family dwelling. The police, upon arrival at 36 Main, discover the house had been divided into two apartments, with Doe living only upstairs. Surely, Doe's downstairs neighbor would have cause to complain if a search of his apartment could be authorized by the mistaken assumption that 36 Main consisted of a single, undivided dwelling unit. James Canestri here is in the same status as the hypothetical downstairs neighbor. He had a room of his own in the basement of his mother's house. No one else had access to that room. Certainly it was a place to which he might attach a reasonable expectation of privacy, Katz v. United States, 389 U.S. 347 (1967). When the police discovered the existence of the room, the lock, James

Canestri's exclusive interest in it, and Joseph Canestri's apparent lack of access to it, they could go no farther, for the warrant could not have authorized the search of such a room.

The court below cited against defendant on this issue United States v. Santore, 290 F.2d 51, 67 (2 Cir. 1960) and United States vs. Jordan, 349 F.2d 107, 109 (6 Cir. 1965). Neither are relevant. In Santore, premises described as a single family dwelling had in fact been split into apartments, but it was the original and obvious target of the search (and not the unknown tenant) who was attempting to complain of the search--simply because the warrant had not properly "described" the premises. Jordan presented a claim that the second floor (where the still was found) of what had been described as a single dwelling unit really was not his; it was difficult to divine just what his claim was as to who belonged to the upstairs--but is absolutely clear that it was not a situation, as here, of the "innocent bystander" or unknown occupant of the premises complaining of an unwarranted search of his property.

The Fourth Amendment protection afforded the defendant's interest in his room derives from the requirement in the language of the Constitution itself that warrants particularly describe "the place to be searched, and the persons or things to be seized". When the particular description focused on Joseph Canestri's home, it excluded James Canestri's segregated and separate room. That

is precisely what the warrant requirement was meant to do. Probable cause to search a single person and his dwelling cannot be extended to others near him or to places near him. Such an extension would return to the days of unbridled state power and to the abhorrent, general search.

B. Even if the Officers were Legitmately Present in the Room, the General Search for "Unlawful" Matters and Seizure of the Guns in Question was Unlawful.

1. A Machine Gun Per Se is Not Contraband.

26 U.S.C. §5861 (d) makes it

> "unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."

Thus, mere receipt or possession of a machine gun is not illegal. Rather, only receipt or possession of a machine gun which is not registered is illegal.

"Contraband" is defined in 49 U.S.C. §781(b). As used in this section, the term "contraband article" means--1) 'Any narcotic drug...which does not bear appropriate tax...stamps",2) 'any firearm, with respect to which there has been committed any violation of any provision of the National Firearms Act or any regulation issued pursuant thereto".

Under this definition it has been held that narcotics, bearing tax-paid internal revenue stamp known to be stolen from a drug store and transported only intra-state, found in the

possession of the defendant who did not have an intent to sell, did not constitute contraband. United States v. One 1947 Oldsmobile Sedan, 104 F. Supp. 159 (D.N.J. 1959). Moreover, even in the case of heroin, it appears that only in the absence of the required revenue stamp does that substance constitute contraband. United States v. One Dodge Coupe, 43 F. Supp. 60 (S.D.N.Y 1942).

For these machine guns to be contraband, therefore, they must have been--on their face--within the proscription of the statutes.

Clearly, such was not the case. There was no evidence that any of the police involved knew or had any reason to believe the guns were not registered. First, a registration record, unlike a tax stamp, is not required to be affixed to the gun. Rather §5841(e) merely requires the registeree to "retain proof of registration which shall be made available to the Secretary or his delegate upon request". The non-registered status of these guns, therefore, could not be determined by mere physical inspection. Moreover, it would appear that the local police officers involved were not even authorized to demand production of the certificates.

Furthermore, to establish that these guns were contraband, the police officers had to determine that the guns were serviceable, 26 U.S.C. §5852(e). An "unservicable firearm", which is exempted from registration requirements, and thus, which cannot

be contraband, is defined as "a firearm which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to firing condition." 26 U.S.C. §5845(h). There was no showing by the government that the police officers making the seizure had any way of knowing, or any reason to believe that the guns at issue were serviceable. Moreover, in response to defense questioning, Officer Rubino indicated that he had no specialized knowledge of guns, and that neither he, nor anyone else at 85 Grannis Road, had tested the guns to see that they were serviceable. Absent such testing, the police could not have had probable cause to believe the guns were contraband. Further Rubino testified that he was no expert on automatic weapons and was not at all sure that the weapons he seized were indeed automatics. One of the three turned out not to be automatic. Best two of three might be good enough for checkers or baseball playoffs--but not for the certainty required in identifying "contraband" while searching for something else.

Further, it is here quite clear that this was not a situation where officers, in the course of a warranted search, happened to blunder upon something which was clearly contraband. They insisted upon entry into the locked room,notwithstanding their knowledge or understanding it was under the sole control of James, and not Joseph Canestri. The specific guns here in question came

from the locked cabinet they insisted upon entering after they had begun "investigating" James' collection. Significantly, it was James himself, in possession of the key, who opened the cabinet. Rather clearly, the officers were following their investigation of James at that point rather than any real thought that he had the Mezzanotte weapons.

2. These Guns Could not Legally be Seized During a Search Pursuant to a Warrant not Specifically Identifying them as Objectsof the Search under the Circumstances Here Present

The Supreme Court, a half century ago, in Marron v. United States, 275 U.S. 192 (1927), made it "clear that nothing is to be left to the discretion of the officer executing a warrant--that if something is not described in the warrant, it cannot be seized". Marron has not in any way been compromised by Warden v. Hayden, 387 U.S. 294 (1967),which did away with the so-called "mere evidence" rule. The Second Circuit, in United States v. Dzialak, 441 F.2d. 212 (2 Cir. 1971), made it clear that Warden v. Hayden applied only to searches incident to arrest and did not operate to expand the limited authority granted by a specific search warrant to cover a general ranging search for possibly incriminating material. Dzialak involved a search very similar to the one here, lasting four hours and involving property clearly outside the items named in the warrant. There, the Second Circuit focused on the fact that the police had an opportunity to get a second warrant:

" Of far greater importance, however, is the fact that the burden placed upon the police by such a rule is minor indeed. As we said when dealing with a similar situation in LaVallee, the police had ample time and opportunity to seek another warrant for the additional items seized. They simply did not so so. While at one level it may be somewhat formalistic to demand they do secure such an additional warrant, the dangers inherent in a contrary rule are much too great. We are given at least a glimpse of such possible dangers by the facts of this very case. In executing what was a very precise warrant, the police spent more than four hours ransacking appellant's house for any possible incriminating evidence. Of the items seized, those which were not described in the warrant far outnumbered those described. The rule we reaffirm today not only avoids such an abhorrent general search but encourages greater care in obtaining the magistrate's approval for a specific search."
441 F.2d. 212, at 217.

The government urged, and the court below apparently accepted, the view that this court's decision in United States v. Pacelli, 470 F. 2d 67 (2 Cir. 1972) undercut Marron and Dzialak sufficiently to allow the search and seizure in this case. Such a holding is, we think, completely unjustified either by the facts or language of Pacelli. There, in the course of a search of premises directed by a warrant for heroin alone, the officers happened upon some boric acid which was seized as evidence. The court in Pacelli stressed the single, limited nature of the find--its inadvertence--and the obvious distinction from Dzialak which (like the case at bar) featured a lengthy, much more searching, far ranging exploration beyond the scope of the warrant. It is simply

inconceivable to the defense in this case that a careful look at the facts here could lead one to the conclusion that this case is governed by Pacelli rather than Dzialak.

Although there was some discussion in Pacelli concerning the present vitality of Marron v. United States, supra in light of Mr. Justice White's dissent in Coolidge v. New Hampshire, 430 U.S. 443 (1971), the Coolidge majority did cite Marron approvingly. See also Stanley v. Georgia, 394 U.S. 572 (concurring opinion of Mr. Justice Stewart). The Supreme Court opinion in Coolidge itself strongly points to invalidation of the search here. Although leaving some room for the "plain view" justification for seizure of items not specifically named in a warrant, the court pointed out that, "in the vast majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the 'plain view' doctrine has been to indentify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal." 403 U.S. 443 at 465.

For a seizure to be justified under the "plain view" doctrine, the Court held, it must be truly inadvertent. One "distinct objective" of the Fourth Amendment guarantee is that "those searches deemed necessary shall be as limited as possible". Coolidge, supra, at 467. Can it seriously be said that the insistence on searching James Canestri's room on a search for items directed

to Joseph Canestri was as "limited as possible"? That three and a half hours of long distance calls checking out each and every one of James' guns was in any way "limited" to Joseph Canestri's premises, as the warrant directed? It is clear that here the police had long since set off on a frolic and detour detailed on-the-spot investigation of the defendant's gun collection. Whether or not that was a "reasonable" thing to expect the officers to do, it was clearly proscribed, we submit, by the Fourth Amendment--by the Supreme Court's holdings in Marron and Coolidge--and by thiscourt's holding in Dzialak.

CONCLUSION

For the reasons stated above, we ask the Court to reverse the defendant's convictions on all counts and to rule that the defendant's Motion to Suppress Evidence should be granted.

Respectfully submitted,

THE DEFENDANT
JAMES V. CANESTRI

By _____

IRA B. GRUDBERG
JACOBS, JACOBS & GRUDBERG, P.C.
207 ORANGE STREET
NEW HAVEN, CONNECTICUT
HIS ATTORNEYS

LAW OFFICES OF
JACOBS, JACOBS & GRUDBERG
A PROFESSIONAL CORPORATION
ISRAEL J. JACOBS (1918-1963)
HOWARD A. JACOBS
STANLEY A. JACOBS
IRA B. GRUDBERG
M. MITCHELL MORSE
DAVID L. BELT

207 ORANGE STREET · NEW HAVEN, CONNECTICUT 06503
TELEPHONE (203) 772-3100

OUR FILE NO.

May 9, 1975

A. Daniel Fusaro, Clerk
United States Court of Appeals
Foley Square
New York, New York 10007

Re: United States V. Canestri
Docket No. 75-114

Dear Mr. Fusaro:

I am enclosing herewith twenty-five (25) copies of Appellant's Brief in the above matter.

I hereby certify service of three (3) copies upon Thomas F. Maxwell, Jr., Assistant United States Attorney, first class mail.

Very truly yours,

JACOBS, JACOBS & GRUDBERG, P.C.

By Ira B. Grudberg
Ira B. Grudberg

IBG:dct
Enc.
cc: Thomas F. Maxwell, Jr., Esq.